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Supreme Court of the United States

OCTOBER TERM, 1931

No. 265

L. A. NIXON,
Petitioner,

against

JAMES CONDON and C. H. KOLLE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITIONER'S POINTS.

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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 265.

L. A. NIXON,
Petitioner,

against

JAMES CONDON and C. H. KOLLE,
Respondents.

PETITIONER'S POINTS.

Preliminary Statement.

This case comes before this Court on writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, granted October 19, 1931 (R. 31), to review a judgment entered in that court on May 16, 1931 (R. 30-31), which affirmed a judgment of the United States District Court for the Western District of Texas, filed July 31, 1929, dismissing the petition (R. 10).

The opinion of the District Court is printed in the record at pages 15-27 and reported 34 F. (2d) 464.

The opinion of the Circuit Court of Appeals is printed in the record at pages 28-30 and reported 49 F. (2d) 1012.

The petitioner, a citizen of the United States and of the State of Texas, brought this action in the United States

District Court for the Western District of Texas against the respondents, who were judges of election in Precinct No. 9, El Paso County, Texas, to redress an injury which he sustained by reason of the acts of the respondents in their official capacities (R. 1).

The Petition.

The petitioner is a Negro. He was a bona fide member of the Democratic Party of the State of Texas and in every respect was entitled to participate in elections held within that State, whether for the nomination of candidates for office or otherwise (R. 2-3).

On July 28, 1928, a Democratic primary was held in the State of Texas to select candidates, not only for State officers, but also for United States Senator and Congressmen (R. 1-2). On that day the petitioner presented himself at the polls and offered to take the pledge to support the nominees of the Democratic primary election held on that day and to comply in every respect with the valid requirements of the laws of Texas, save as they violated the privileges conferred upon and guaranteed to him by the Constitution and laws of the United States. He requested the respondents to supply him with a ballot and permit him to vote at the Democratic primary election held on that day and the respondents refused to permit the petitioner to vote or to furnish him with a ballot and stated as the reason that under instructions from the Democratic county chairman, pursuant to resolution of the State Democratic Executive Committee, adopted under the authority of Chapter 67 of the Laws of 1927 of Texas, only *white* Democrats were allowed to participate in the Democratic primary then being held (R. 2-3). *The respondents ruled that the petitioner was not entitled to vote in the Democratic primary because he was a Negro* (R. 3, 5). The resolution of the State Democratic Executive Committee of Texas, under the terms of which respondents purported to act, reads as follows (R. 3):

The Resolution in Question.

"RESOLVED: That all white Democrats who are qualified under the Constitution and laws of Texas and who subscribe to the statutory pledge provided in Article 3110, Revised Civil Statutes of Texas, and none other, be allowed to participate in the primary elections to be held July 28, 1928, and August 25, 1928, and further, that the Chairman and secretary of the State Democratic Executive Committee be directed to forward to each Democratic County Chairman in Texas a copy of this resolution for observance." (Black type ours.)

The statute under the authority of which the Democratic State Executive Committee adopted this resolution, Chapter 67 of the Laws of 1927, First Called Session (Article 3107, Chapter 13 of the Revised Civil Statutes of Texas), gave authority to the State Executive Committee to prescribe qualifications of party members and determine who shall be qualified to vote or participate in such political party. The statute was passed as an "emergency" measure, because, as the statute itself proclaims, "the fact that the Supreme Court of the United States has recently held Article 3107 invalid, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each House be suspended * * *" (R. 4-5).

The Statute in Question.

"AUTHORIZING POLITICAL PARTIES THROUGH STATE EXECUTIVE COMMITTEES TO PRESCRIBE QUALIFICATIONS OF THEIR MEMBERS.

(H. B. No. 57)

CHAPTER 67.

An Act to repeal Article 3107 of Chapter 13 of the Revised Civil Statutes of Texas, and substituting in its place a new article providing that every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be quali-

fied to vote or otherwise participate in such political party, and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. That Article 3107 of Chapter 13 of the Revised Civil Statutes of Texas be and the same is hereby repealed and a new article is hereby enacted so as to hereafter read as follows:

'ARTICLE 3107. Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party.'

SEC. 2. The fact that the Supreme Court of the United States has recently held Article 3107 invalid, creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended and said rule is hereby suspended, and that this Act shall take effect and be in force from and after its passage, and it is so enacted.

Approved June 7, 1927.

Effective 90 days after adjournment."

The decision of this Court which was referred to by the Texas Legislature was the case of *Nixon* v. *Herndon*, 273 U. S. 536, which held unconstitutional a statute of the State of Texas which expressly prohibited Negroes from participating in Democratic primary elections held in that State.* It is alleged in the petition (and the history of

* The statute involved in *Nixon* v. *Herndon*, i.e., the old Article 3107:

"Article 3093a. All qualified voters under the laws and constitution of the State of Texas who are bona fide members of the democratic party shall be eligible to participate in any democratic party primary election, provided such voter complies with all laws and rules governing party primary elections; however, in no event shall a *negro* be eligible to participate in a democratic party primary election held in the State of Texas, and should a *negro* vote in a democratic primary election, such ballot shall be void and election officials are hereby directed to throw out such ballot and not count the same." (Italics ours.)

the Act sustains the allegation) that Chapter 67 of the Laws of 1927 was an attempt to evade the decision of this Court in *Nixon* v. *Herndon* and to provide, by delegation to the party Executive Committee, the disfranchisement of Negroes which this Court held could not be done by direct action of the Legislature (R. 5-6).

The petition also alleges that at the time of the passage of Chapter 67 of the Laws of 1927 of Texas the Democratic Party was the only political party in the State which held a primary election and that the statute, when it referred to the State Executive Committee, was enacted for the purpose of preventing the petitioner and other Negroes who were members of the Democratic Party from participating in Democratic primary elections (R. 6). Furthermore, the petition sets forth that there are many thousands colored Democratic voters in the State of Texas situated as is the petitioner; that Texas is a State which is normally so overwhelmingly Democratic that nomination on the Democratic ticket is equivalent to election, and that the only real contest at the polls is that in the Democratic primaries. And, finally, it is alleged that the acts of the respondents in denying the petitioner the right to vote at the Democratic primary in question were wrongful, unlawful and without constitutional warrant and deprived him of valuable political rights, to his damage in the sum of $5,000 (R. 7-8).

This suit was brought under Section 41 of Title 28 of the United States Code, subdivisions 1, 11, 12 and 14 being applicable.

Judgment is demanded against the respondents (a) because Chapter 67 of the Laws of 1927 of Texas and the resolution of the Democratic State Executive Committee thereunder denied the petitioner the equal protection of the laws of Texas, in violation of the Fourteenth Amendment to the Constitution of the United States; (b) because the petitioner's right to vote at the primary election was denied and abridged by the resolution of the Democratic State Executive Committee and the action of the Legislature of Texas on account of his race and color, in viola-

tion of the Fifteenth Amendment to the Constitution; (c) because the resolution and statute in question are contrary to Section 31 of Title 8 of the United States Code; and (d) because the respondents, acting under a delegation of State power, violated those sections of the Constitution and that Act of Congress when they denied the petitioner the right to vote on the ground that he is a Negro (R. 6-7).

Grounds of Demurrer.

The respondents made a motion to dismiss. In addition to controverting the allegations of the petition with respect to the constitutionality of the statute and the proceedings it was urged that the subject-matter of the suit is political and that the Court was without jurisdiction to determine the issues or to award the relief prayed for; that the allegations of the petition were not sufficient to constitute a cause of action; that irrespective of statutory authority, the State Executive Committee of a political party had authority to determine who should comprise its membership. The motion also put into issue the allegation that the petitioner was a Democrat (R. 8-10). The last ground presents an issue of fact which could not be determined on a motion addressed to the pleadings.

The Decision of the District Court.

Honorable Charles A. Boynton, District Judge, who heard the motion, granted the motion to dismiss in an opinion (R. 15-27, 34 F. [2d] 464) in which he said: (1) that the Fourteenth and Fifteenth Amendments to the Constitution of the United States cannot be violated except by some action properly to be characterized as State action; (2) that Chapter 67 of the Laws of 1927 on its face directs no action in violation of the Federal Constitution; (3) that the action of the State Democratic Committee and the judges of election, complained of in the

petition, was not State action, because (a) the members of the committee and the judges of election were not paid by the State, and so were not like the persons officiating at the Illinois and Virginia primaries, who have been held liable in damage to qualified citizens to whom they denied the right to vote; (b) they were not officers of the State; (c) they were acting only as private representatives of the Democratic political Party, and (d) the members of the Democratic Party possess inherent power to prescribe the qualifications of those who may vote at its primaries, irrespective of and without reference to Chapter 67 of the Laws of 1927; and (4) that a primary election is not an election within the meaning of the Fifteenth Amendment, because (a) a political party is not a governmental agency, and (b) at the time the Thirteenth, Fourteenth and Fifteenth Amendments were adopted, primary elections were unknown and therefore may not be held to be covered by these Amendments.

The Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals, in affirming the District Court, rendered an opinion by Bryan, C.J. (R. 28-30; 49 F. (2d) 1012), which held as follows: (1) that the Fourteenth and Fifteenth Amendments apply to State action, not to action of private individuals or associations; (2) that this case differs from *Nixon* v. *Herndon,* because there the element of State action was supplied by the enactment of a statute which expressly discriminated against Negroes, whereas here the statute merely recognized an existing power on the part of the Democratic State Executive Committee to fix the qualifications of its members; (3) that the election officials who rejected the petitioner were appointed by the Democratic State Executive Committee, and were not paid by the State, and (4) that the decision in *West* v. *Bliley* is distinguishable because there the State of Virginia conducted the primary and paid the

expenses thereof, whereas in Texas the State merely regulates a privately conducted primary election so as to secure a fair and honest election.

Jurisdiction.

The jurisdiction of Federal Courts over this suit is provided by Section 41, Title 28 of the United States Code (Judicial Code, Sec. 24, as amended). It is there provided, in subdivision 1, that the District Court shall have original jurisdiction over "* * * First. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties, made or which shall be made, under their authority * * *."

This is a suit of a civil nature at common law for a sum in excess of $3,000 and the matter in controversy arises under (1) the Fourteenth Amendment to the Constitution of the United States; (2) the Fifteenth Amendment to the Constitution of the United States; (3) Section 31, Title 8 of the United States Code.

In similar circumstances this Court has assumed jurisdiction.

Wiley v. *Sinkler,* 179 U. S. 58, 65.
Swafford v. *Templeton,* 185 U. S. 487.
Myers v. *Anderson,* 238 U. S. 368.
Nixon v. *Herndon,* 273 U. S. 536.
Ward v. *Love County,* 253 U. S. 17, 22.
Cf. *Love* v. *Griffith,* 266 U. S. 32.

In *Bliley* v. *West,* 42 F. (2d) 101, the Circuit Court of Appeals for the Fourth Circuit affirmed the order of the District Court for the Eastern District of Virginia (33 F. (2d) 177, opinion by Groner, D.J.) overruling a de-

murrer to a petition seeking the same relief as is sought in this case. There, the Democratic State Convention, like the Democratic State Committee here, adopted a resolution that only white persons should participate in Democratic primaries, and the petitioner, a Negro, was not permitted to vote in a Democratic primary in the State of Virginia. No attempt was made to bring that case up for review by this Court.

The jurisdiction of this Court is not open to attack on the ground that the subject-matter of the suit is "political." That argument was disposed of in *Nixon* v. *Herndon, supra.**

Subdivision 11 of Section 41 of Title 28 of the Judicial Code likewise gives a basis for jurisdiction by the Federal Courts, for it authorizes suits for injuries on account of acts done under the laws of the United States *"or to enforce the right of citizens of the United States to vote in the several States."*

Subdivision 12 deals with suits concerning civil rights and gives the District Courts jurisdiction "of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property or of the deprivation of any right or privilege of a citizen of the United States by any act done in furtherance of any conspiracy mentioned in Section 47 of Title 8."

Subdivision 14 gives the Federal Courts jurisdiction "of all suits at law or in equity authorized by law to be brought by any person to redress deprivation under color of any law, statute, ordinance, regulation, custom or usage of any State or any right, privilege or immunity secured by the Constitution of the United States or of any right secured by any law of the United States providing for

*See opinion of Mr. Justice Holmes at page 540.

equal rights of citizens of the United States or of all persons within the jurisdiction of the United States."

This is a suit at law to redress the deprivation of petitioner's right to vote at a primary election in the State of Texas. The deprivation was under color of a statute of the State of Texas, to wit, Chapter 67 of the Laws of 1927, and/or under color of a resolution adopted by the State Democratic Executive Committee of Texas. The suit is not only, however, to redress the deprivation of civil rights by reason of the unconstitutional restraint upon the petitioner's right of suffrage in violation of the Fourteenth and Fifteenth Amendments, but it is also based specifically upon the violation of a Federal statute, viz., Section 31, Title 8 of the United States Code, which provides:

> "Section 31. *Race, color, or previous condition not to affect right to vote.* All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

Section 43 of Title 8 of the United States Code also grants a right of action for violation of the right of franchise guaranteed by Section 31, *supra.*

It should be noted in this connection that not only candidates for local office but also for United States Senator and Congressman were nominated at the primary held in Texas on July 28, 1928. (R. 2).

The authorities already cited demonstrate that in similar instances this Court has assumed jurisdiction.

In the recent case of *Love* v. *Griffith*, 266 U. S. 32, the plaintiffs as qualified electors sought to enjoin as violative of the Constitution the enforcement of a rule made by the

Democratic City Executive Committee of Houston, Texas, that Negroes should not be allowed to vote at a particular Democratic primary election. The injunction was denied and the plaintiffs appealed to the Court of Civil Appeals of Texas, which held that at the date of its decision, months after the election, the cause of action had ceased to exist and that the appeal would not be entertained on the question of costs alone. The suit was brought to this Court on writ of error and was dismissed, Mr. Justice Holmes saying at page 34:

> **"If the case stood here as it stood before the court of first instance it would present a grave question of constitutional law and we should be astute to avoid hindrances in the way of taking it up.** But that is not the situation. The rule promulgated by the Democratic Executive Committee was for a single election only that had taken place long before the decision of the Appellate Court. No constitutional rights of the plaintiffs in error were infringed by holding that the cause of action had ceased to exist. The bill was for an injunction that could not be granted at that time. There was no constitutional obligation to extend the remedy beyond what was prayed." (Black type ours.)

The "grave question of constitutional law" which this Court could not consider in *Love* v. *Griffith*, because in that instance time had made the issue moot, has become the vital point of conflict in the present suit.*

The Circuit Court of Appeals accepted jurisdiction of this cause and decided the motion to dismiss upon the merits without questioning the jurisdiction of the Federal Court (R. 28-30).

The District Court after deciding the motion on the merits evidently confused the question of jurisdiction and the question of absence of merits in the discussion in the last paragraph of the opinion (R. 27).

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* *Robinson* v. *Holman*, 181 Ark. 428, appeal dismissed and certiorari denied 282 U. S. 805, apparently on same grounds as *Love* v. *Griffith*.

This distinction between **jurisdiction** and **merits** has been clearly set forth by this Court in *Binderup* v. *Pathe Exchange,* 263 U. S. 291, at page 305,* and *General Investment Co.* v. *N. Y. Central R. R.,* 271 U. S. 228, at page 230.†

As will be seen after the case of *Nixon* v. *Herndon, supra,* has been analyzed the sole difference between that case and this one is that there the respondents denied the petitioner the right to vote at a Democratic primary because the statute specifically forbade colored people to vote in Democratic primaries, whereas in this case the same petitioner was refused the right to vote at a Democratic primary by the election officials on the ground that a resolution of the States Democratic Executive Committee, adopted pursuant to authority granted by the Legislature, prohibited Negroes from voting at Democratic primaries.

The only issue in this case is, then, the question of whether the acts of the respondents was State action. If it was State action, then Nixon v. Herndon is applicable. This is clearly a question over which this Court has jurisdiction. It presents a justiciable issue irrespective of the merits of the contention. As the full nature of this issue is demonstrated by the succeeding Points, for the sake of brevity it will not be repeated here.

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* In the *Binderup* case, Mr. Justice Sutherland said:

> "Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the court as a federal court; and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicated upon the existence of jurisdiction, not upon the absence of it."

† In the *General Investment Company* case, Mr. Justice Van Devanter said:

> "By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits (*The Fair* v. *Kohler Die Co.,* 228 U. S. 22, 25; *Geneva Furniture Co.* v. *Karpen,* 238 U. S. 254, 258)."
>
> * * *

We respectfully refer the Court to the ensuing argument, not only as a demonstration of the merits of the petitioner's case, but also in support of the jurisdiction of this Court.

Summary of Petitioner's Argument.*

I. The interest protected in *Nixon* v. *Herndon* was the right to vote in a primary and is the same interest invaded here, and the classification rejected by that case was based on race and color and is the same classification applied here. There was no question in *Nixon* v. *Herndon* of State action, that being implicit in the statute. That is the only open question in this case under the Fourteenth Amendment which was not disposed of in the former case.

II. The petitioner by being denied the right to vote at the primary election because of his color was denied the equal protection of the laws by the State of Texas in violation of the Fourteenth Amendment. The respondents' action was action of the State of Texas, because—

A. The power of the respondents to deny the petitioner's right to vote at the primary election was derived from the resolution of the Democratic State Executive Committee, which was adopted pursuant to the authority granted to it by Chapter 67 of the Laws of 1927. The respondents' power was consequently derived from the State and was not inherent in the party.

B. Even if the Democratic State Executive Committee in adopting the resolution restricting voting at Democratic primaries to white persons exceeded the powers delegated to it by the Legislature in Chap-

* Even if the arguments made herein were all invalid, nevertheless the petition alleges a cause of action which the State Court could not have failed to entertain without itself violating the Fourteenth Amendment, and of which the United States District Court had jurisdiction, in view of the substantial Federal questions raised and argued herein. Having full confidence in the arguments here presented, we do not wish unduly to extend this brief and shall omit elaboration of this further argument unless the Court requests otherwise.

ter 67 of the Laws of 1927, its action, though *ultra vires*, was nevertheless State action.

C. The Democratic State Executive Committee, acting in relation to primary elections, was part of the governmental machinery of the State. In adopting the resolution in question the action of the Committee was State action and the resolution could not therefore justify the denial of the petitioner's right to vote.

D. Irrespective of Chapter 67 of the Laws of 1927 of Texas and the resolution of the Democratic State Executive Committee the respondents, acting as judges of election, when they denied the petitioner the right to vote were applying to a public purpose powers with which the State had vested them, and consequently their action was State action as defined in *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278, and *Yick Wo* v. *Hopkins*, 118 U. S. 356.

III. The respondents' denial of the petitioner's right to vote in the Democratic primary was in violation of the Fifteenth Amendment.

(A) The same arguments with respect to State action under the Fourteenth Amendment are applicable under the Fifteenth Amendment.

(B) The petitioner was both denied the right to vote and his right to vote was abridged within the meaning of the Fifteenth Amendment.

(C) The right to vote guaranteed by the Fifteenth Amendment is not the same thing as an election referred to in Article I, Section 4, of the Constitution and *Newberry* v. *United States*, 256 U. S. 232, is inapplicable.

(D) Section 31, Title 8, of the United States Code prohibits discrimination by denying the right to vote by reason of color and was violated by the action of the respondents.

I.

The interest protected in *Nixon* v. *Herndon* was the right to vote in a primary and is the same interest invaded here, and the classification rejected by that case was based on race and color and is the same classification applied here. The only question before this Court is whether the invasion of this interest and this classification were the result of State action.

As the case at bar is really a sequel to *Nixon* v. *Herndon*, 273 U. S. 536, and in all respects except one identical with that case, the determination of this question will be facilitated by a preliminary consideration of *Nixon* v. *Herndon* itself and a precise delimitation of the respects in which it is controlling here.

There Nixon, the same petitioner, brought his suit in the United States District Court for the Western District of Texas to recover the sum of $5,000 in damages from the judges of election, who, like the present respondents, had refused to permit him to vote in a Democratic primary in the State of Texas. The primary then, as in this case, was held at El Paso for the nomination of candidates on the Democratic ticket for United States Senator, for Representative to Congress and for State and local offices. Then, as in this case, the judges of election refused to permit the petitioner to vote in the Democratic party primary solely because he was a Negro.

In that case it was sought to justify this discriminatory classification based upon the petitioner's color by a Texas statute enacted in May, 1923, designated Article 3093-a (the former Art. 3107, Texas Rev. Civ. Stat.), which provided that "in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas," etc.

Following the decision in *Nixon* v. *Herndon* that statute was repealed and the new statute adopted.

Now the judges of election have sought to justify their discrimination against the petitioner, based as it is on his color, because of a resolution of the State Democratic Executive Committee quoted *supra,* page 3, which was adopted pursuant to Chapter 67 of the Laws of 1927 and which restricts voting in Democratic primary elections to "white Democrats."

The statute of 1927 did not expressly render Negroes ineligible to vote at Democratic primaries, but empowered the State Executive Committees of such political parties as held primary elections to determine who should be qualified to vote at such primaries.*

In both cases petitioner contended that the deprivation of his right to vote was in violation of the Fourteenth and Fifteenth Amendments.

In that case, as in this case, the defendant judges of election moved to dismiss the petition on the ground that the subject-matter of the action was political, that it was not within the jurisdiction of the court, that neither the Fourteenth nor the Fifteenth Amendment nor any laws adopted pursuant thereto applied to primary elections, and that the petition failed to state a cause of action.

In *Nixon* v. *Herndon* this Court held:

> (1) that it was unnecessary to determine whether the petitioner was deprived of his right to vote within the meaning of the Fifteenth Amendment, because he had been deprived of civil rights under the Fourteenth Amendment;†

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* The Democratic Party being the only party polling over 100,000 votes in Texas was the only party required by law to hold primary elections.

† "The important question is whether the statute can be sustained. But although we state it as a question, the answer does not seem to be open to a doubt. We find it unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth. That amendment, while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them" (pp. 540-541).

(2) that this deprivation of civil rights was accomplished by an arbitrary classification, viz.: one without constitutional justification;*

(3) that this classification was the result of State action;† and

(4) that consequently the Fourteenth Amendment was applicable and a common law right of action for damages lay against the offending judges of election.‡

The sole question before this Court is whether the action of the respondents as judges of election in denying the petitioner the right to vote was taken under State authority or was in effect action by the State itself. If this be so the present case will then come within the category of *Nixon* v. *Herndon* and the action of the respondents would be without constitutional justification. In that event the judgment appealed from must be reversed.

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* "The statute of Texas, in the teeth of the prohibitions referred to, assumes to forbid negroes to take part in a primary election the importance of which we have indicated, discriminating against them by the distinction of color alone" (p. 541).

† "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case" (p. 541).

‡ "Of course the petition concerns political action but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since *Ashby* v. *White*, 2 Ld. Raym. 938, 3 *id.* 320, and has since been recognized by this Court. *Wiley* v. *Sinkler*, 179 U. S. 58, 64, 65. *Giles* v. *Harris*, 189 U. S. 475, 485. See also Judicial Code, Sec. 24 (11), (12), (14). Act of March 3, 1911, c. 231; 36 Stat. 1087, 1092. If the defendants' conduct was a wrong to the plaintiff, *the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result*" (p. 540, italics ours).

II.

The petitioner in being deprived of the right to vote at a primary because of his color was denied the equal protection of the laws by the State of Texas in violation of the Fourteenth Amendment.

A. The power of respondents to deny petitioner's right to vote at the primary election was derived from the resolution of the State Democratic Executive Committee adopted pursuant to authority granted by Chapter 67 of the Laws of 1927. Both the statute and the resolution adopted thereunder violated the Fourteenth Amendment because they authorized and worked a classification based on color.

The language of the new Article 3107 as enacted by Chapter 67 of the Laws of 1927 is broad enough to be an authorization from the Texas Legislature empowering the State Executive Committee of the Democratic Party to determine, among other things, that only white Democrats shall be qualified to vote at Democratic primary elections.*

If the Democratic Legislature of Texas could not constitutionally forbid Negroes to vote at primaries in view of the decision of this Court in *Nixon* v. *Herndon,* it could nevertheless with a feeling of assurance entrust to the Democratic State Committee power to enact such prohibition and achieve the same end.†

Legislative Intention.

That it was the legislative intention to accomplish this purpose and to evade and nullify that decision appears from the face of the enactment. The statute expressly indicates that the new Article 3107 was being substituted

* See Chapter 67 of Laws of 1927, set forth in full at page 3, *supra.*

† This Court has held that a legislative body cannot accomplish by indirection something which it is without power to do directly. *Cf. Hammer* v. *Dagenhart,* 247 U. S. 251, and *Child Labor Tax Case,* 259 U. S. 20. And see *Bailey* v. *Alabama,* 219 U. S. 219.

for the one held unconstitutional, in order to take care of the "emergency" created by the decision in *Nixon* v. *Herndon*. What could this emergency be if not that Negroes would be able to vote at the next primary election unless some new method were devised to exclude them? If the Legislature had intended to meet the emergency in such a manner as to conform to, rather than circumvent the decision of this Court which created the so-called emergency, it is unthinkable that the Legislature would not expressly have stated in the new provision that the wide language conferring authority on the Executive Committee to determine who should vote at primary elections was not to be construed to authorize the exclusion of Negroes because of their race and color. The Legislature was actively aware of the necessity of limiting the authority of the State Committee, for it did actually impose limitations by the proviso which forbade the denial of the right to vote at primary elections "because of former political views or affiliations or because of membership or non-membership in organizations other than the political party." It would have been a simple matter to add the words "or because of race or color." The failure of the Legislature to do so in the light of the declared emergency created by the invalidation of the former Article 3107 enacted in May, 1923, completely disposes of any and all doubt as to the proper construction of the new statute of 1927. By providing that the Executive Committee "shall in its own way determine who shall be qualified to vote," Chapter 67 of the Laws of 1927 plainly delegated authority to the committee to determine among other things that only white Democrats should be entitled to vote at Democratic primary elections.*

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* Senator Thomas P. Love, a member of the Texas Senate when Article 3107 was adopted in 1927, filed in his own behalf a brief in the Texas Supreme Court in *Love* v. *Wilcox*, 28 S. W. (2d) 515, in which he was plaintiff. In that brief he said that the statute had "no other purpose whatsoever" than "to provide, if possible, other means by which Negroes could be barred from participation, both as candidates and voters, in the primary elections of the Democratic Party, which would stand the test of the courts." And see *House Journal* of First Called Session of the Fortieth Legislature of Texas, at pages 302 *et seq.*, and arguments by Representatives Faulk and Stout discussing Article 3107, which was House Bill No. 57.

The Democratic State Executive Committee did "in its own way determine who shall be qualified to vote" by providing that only "white Democrats" who are qualified under the Constitution and laws of Texas and who subscribe to Article 3116 of the Revised Civil Statutes, should have the right to vote in the primaries of July 28, 1928, and August 25, 1928 (see Resolution *supra*, p. 3).

It would seem to follow as a matter of course that the Democratic State Executive Committee was acting under and pursuant to the authority which the Legislature had conferred upon it.

The Legislature, then, having given to the Democratic State Executive Committee the authority to fill in the blank which it left in the statute as to the qualification of voters at primaries, made the Democratic State Executive Committee pro tanto its agency, and the old maxim qui facit per alium facit per se is applicable.

It follows that the resolution of the Executive Committee must be read as an integral part of the statute itself, and when superimposed upon Chapter 67 of the Laws of 1927, this new section is identical with the old Article 3107 which was considered and condemned in *Nixon* v. *Herndon*.

Although the new Article 3107 makes no discrimination against Negroes in so many words, this Court cannot accept the statute at its face value, but must go further and examine what has been accomplished behind and by means of its bland exterior by the Democratic State Executive Committee. In the words of Mr. Justice Matthews in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in *Henderson* v. *Mayor of New York*, 92 U. S. 259;

Chy Lung v. *Freeman*, 92 U. S. 275; *Ex parte Virginia*, 100 U. S. 339; *Neal* v. *Delaware*, 103 U. S. 370; and *Soon Hing* v. *Crowley*, 113 U. S. 703."

This Court has on other occasions rejected as unconstitutional statutes which sought to re-establish the *status quo* of the days before the adoption of the Fifteenth Amendment by excluding Negro voters from the polls through the medium of "grandfather clauses."

Guinn v. *United States*, 238 U. S. 347.
Myers v. *Anderson*, 238 U. S. 368.

The "Inherent Power" Argument.

It is urged by the respondents and by the courts below (R. 25, 30) that regardless of the statute there is inherent power in the political party to prescribe the qualifications of its own members and those entitled to vote at party primary elections. It has been shown above that the Democratic State Executive Committee intended to act under the new Article 3107; but **even if the Committee did not intend to act under the statute it could not avoid doing so.** For assuming that such inherent power existed before the Legislature of Texas manifested its intention to take over the field of primary elections by enacting legislation touching on every phase of the primary, including the qualifications of voters, this power no longer exists over the qualifications of voters at party primaries.* It is sufficient that the Legislature has spoken on this subject. It has invaded the field of the primary and it must therefore be deemed to have assumed full control of the situation.

The State being the supreme sovereignty, it must be deemed to have superseded whatever sovereign powers

* This does not mean that for some purposes the Executive Committee may not have inherent power still unaffected by the action of the Legislature; nor does it mean that if the Legislature had not acted with respect to primaries, the parties would not have had jurisdiction over the composition of the electorate at such primaries. These are matters that need not now be questioned or decided.

political parties may previously have had with respect to the control of primaries and party membership. Fruitful analogy and ample support and authority are supplied by the cases which have dealt with the relation of Congress and the State Legislatures in connection with the Commerce Clause and the State police powers.*

That the State has expressed itself in regard to primaries is evidenced by old Article 3107, considered in *Nixon* v. *Herndon,* in which the Legislature specifically provided the qualifications of voters at primary elections. It also provided by Article 3110 of the Revised Civil Statutes of 1925 a statutory pledge for voters.†

It is clear from the face of Chapter 67 of the Laws of 1927 that the Legislature did not relinquish its sovereignty when it delegated its power to determine the qualifications of voters at primaries to the party executive committees, because (1) the new statute did not purport to withdraw legislative sovereignty but merely to substitute a new provision in place of the one declared unconstitutional, the statute, to quote its own terms, being "to repeal Article 3107 of Chapter 13 of the Revised Civil Statutes of Texas, and *substituting in its place* a new article * * *," and (2) the statute contains explicit limitations on the power of the party executive committees forbidding them to deny the right to participate in a primary "because of former political views or affiliations or because of membership or nonmembership in organizations other than the political party."

There is ample authority in the decisions of the Texas courts to demonstrate that the Democratic Party in Texas and its Executive Committee had ceased to have any in-

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* See article by Thomas Reed Powell, 12 Minn. Law Rev. 321, 470; *Lindgren v. United States,* 281 U. S. 38, 46.

†"Art. 3110. *Test on ballot.* No official ballot for primary election shall have on it any symbol or device or any printed matter, except a uniform primary test, reading as follows: 'I am a..... (inserting name of political party or organization of which the voter is a member) and pledge myself to support the nominee of this primary'; and any ballot which shall not contain such printed test above the names of the candidates thereon, shall be void and shall not be counted."

See also Article 2955, qualifications for voters which are applicable to primary elections. Texas Election Law pamphlet, p. 26.

herent power to prescribe qualifications of voters at Democratic primary elections long before the resolution here in question was adopted.*

In *Briscoe* v. *Boyle,* 286 S. W. 275 (Tex. Civ. App., 1926), this very question was squarely presented and the Court held that all inherent power in the premises ceased to exist when the Legislature entered the field of primary election regulation and enacted legislation concerning the qualifications of voters at such elections.† In that case a county Democratic executive committee adopted a resolution excluding from primary elections all who had voted against any Democratic gubernatorial nominee in the previous election. Fourteen such persons brought suit against the judges of election to enjoin them from enforcing the resolution. The injunction was denied in the lower court but on appeal it was granted. The Texas Court of Civil Appeals considered at length the legislative situation with respect to primary elections and held that since the State of Texas had legislated in detail concerning the qualifications of voters at such elections, the political parties themselves no longer had any power to prescribe qualifications not made under authority of the statute. The Court said at page 276:

> "Before the legislative department invaded the province of party government, and assumed control and regulation of party machinery, the right to say who should and who should not participate in party affairs was exercised by the party governments, with which the courts would not concern themselves.
>
> **But the Legislature has taken possession and control of the machinery of the political parties of the State, and, while it permits the parties to operate that machinery, they do so only in somewhat strict accordance with the rules and regulations laid down in minute and cumbersome detail by the legislative body.** The statute designates the official positions to be occupied in the parties, and, while it permits the members of the parties to select such officials,

* And see 43 Harv. Law Rev. 467, 471; 39 Yale Law Journ. 423, 424.
† That case involved the old Article 3107 prior to its consideration by this Court in *Nixon* v. *Herndon.*

they can do so only in the manner prescribed by the statutes, which define the powers and duties of those officials, beyond which they cannot lawfully act. The statute prescribes the time, place, and manner of holding primary elections. It prescribes the forms of the ballots to be used, and the process by which the election officials shall identify and hand out the ballots and by which the voters shall mark and deposit the ballots when voted. It prescribes the declaration to be made by the voter, and the obligation to be assumed by him as a condition precedent to the validity of his ballot. In fine, the Legislature has in minute detail laid out the process by which political parties shall operate the statute-made machinery for making party nominations, and has so hedged this machinery with statutory regulations and restrictions *as to deprive the parties and their managers of all discretion in the manipulation of that machinery.* * * *

By excluding negroes from participating in party primary elections, and by legislating upon the subject of the character and degree of party fealty required of voters participating in such elections, *the Legislature has assumed control of that subject to the exclusion of party action*, thus depriving the party of any power to alter, restrict or enlarge the test of the right of the voter to participate in the party primaries." (Black type and italics ours.)*

The argument of "inherent power" has been disposed of by the Texas Courts in *Love* v. *Wilcox*, 119 Tex. 256, 28 S. W. (2d) 515 (Texas, 1930), which involved the very statute under consideration in this case. There the plaintiff sought a mandamus to compel the Democratic State and County Executive Committees to place his name on a gubernatorial ballot of the Democratic primary and to desist from enforcing a resolution passed in February, 1930, by the Democratic State Executive Committee, which precluded anyone from becoming a candidate at the Democratic primaries if he had voted against the party in the

* The force of that decision was in no way diminished when this Court invalidated the particular provision which excluded Negroes from participating in primary elections. That was only one of many provisions regulating such elections and is clearly treated as such in *Briscoe* v. *Boyle*. The principle of the *supreme sovereignty* of the State over primaries, as against that of the political parties, remains unimpaired.

1928 elections after having participated in the Democratic primary of that year. The Executive Committee sought to justify its action on the basis of its inherent power to manage the affairs of the party and to determine who could present his name for nomination at a primary. The Supreme Court of Texas issued the mandamus, holding that the Executive Committee had no inherent power to exceed any of the limitations for which the Legislature had provided in Article 3107. The Court no doubt had in mind the possibility that its decision might be used as a basis for attacking the Executive Committee resolution barring Negroes from primary elections, and expressly stated that it was not passing on that question. The Court guardedly referred to Article 3107 as a "recognition" by the Legislature of the right of the Democratic Party to create an Executive Committee and to confer on it various discretionary powers concerning the regulation of primary elections. The Court pointed out, however, that the Legislature had limited the scope of this "recognition" by the proviso at the end of Article 3107 and construed this proviso to apply to the exclusion of candidates for nomination because of any form of past disloyalty to the party. Here again inherent power is shown to have dissolved upon the application of State sovereignty.*

The improper application of this power by the Legislature did not take it from the field of sovereignty and restore the inherent power of the party Executive Committee. If this had been so there would have been no such "emergency and an imperative public necessity" referred to in Chapter 67 of the Laws of 1927. Only the lack of inherent power to exclude Negroes could have created this emergency, just as only the legislative intention to confer a statutory power could have led the Legislature to meet the emergency in the way it did.

Furthermore, the enactment of Chapter 67 of the Laws of 1927 would automatically deprive the Democratic Ex-

* The *Briscoe* case was cited as authoritative by the Supreme Court in the *Love* case.

ecutive Committee of any inherent power to bar Negroes from its primary elections if such inherent power had not already been terminated by virtue of the prior enactment. This is true whether, as we contend, the statute is a direct delegation of authority to prescribe qualifications discriminating against Negroes or whether it be a mere general authority to prescribe the qualifications of voters at primary elections delegated by the Legislature.

Under *Bristoe* v. *Boyle* and *Love* v. *Wilcox, supra,* it would have been impossible for the inherent power to survive the creation of the statutory power. The two powers could not exist side by side, and as between them the one conferred by statute must prevail.

"Recognition" of Power Argument.

This would be equally true if Article 3107 is regarded as a "recognition" by the Legislature of the existence of power on the part of the Democratic Party to prescribe through its Executive Committee that only white Democrats shall vote at its primary elections. It could not reasonably be construed as a recognition of *inherent* power because, as we have shown, it was a very plain recognition to the contrary. But even if it had purported to be such a recognition, it would have been a recognition of a non-existing fact, it being clear that no inherent power could have existed after the State sovereignty had taken over the field. If such a recognition could have any effect at all, it would have to be as a recognition that the power once had existed and as a declaration of a legislative intention that it should once again come into existence. **Whether this be regarded as the creation of a new power or the recognition and restoration of an old one, the existence of the power itself would be necessarily and wholly dependent upon the force of the statute and hence would be a statutory power, not an inherent one.**

Moreover, there is no reason why a legislative "recognition" even of an existing inherent power should not turn

the inherent power into a statutory one. That is precisely what was held in *Briscoe* v. *Boyle,* where the various statutory provisions as to how primary elections should be conducted admittedly conferred powers on the Democratic Party and its Executive Committee, which up to the time of the legislative action the party and the committee had enjoyed under their general inherent power to manage their own affairs. There is no material difference in form or substance between these statutory provisions (all but one of which are still in force to-day) and the new Article 3107. If the latter can be regarded as a "recognition" of inherent power, then all the provisions must be regarded as such; and this very recognition by the Legislature of powers, whose existence and exercise had been a purely private internal affair of the Democratic Party, would itself supply the only expression of legislative intention which is needed under the decisions in *Brisco* v. *Boyle* to turn the private affair into a State affair and to transform the inherent power into a statutory power.

Other Texas authorities are to the same effect.*

The Texas cases, with one exception, all confirm our contention that the party executive committees are agencies of the State, subject to legislative control and endowed with powers by the Legislature. The exception to this rule is *White* v. *Lubbock* (Tex. Civ. App., 1930), 30 S. W. (2d) 72, which involved the right of a Negro to vote in a primary, and where the Court held that the party had inherent power to exclude Negroes. This would indicate that only where a Negro is concerned do the usual rules of construction and the common principles of substantive law fall down. But even were the bulk of the Texas cases not in accord with the view here urged, it would be of no importance, because it was recognized by this Court in the *Home Telephone & Telegraph* case that the *local* conception of State action may differ from the *national* conception of State action. In that case it

* *Clancy* v. *Clough,* 30 S. W. (2d) 569, which held that membership on a City Democratic Executive Committee was itself subject to statutory qualifications which could not be added to by the Committee; *Love* v. *Taylor,* 8 S. W. (2d) 795; *Friberg* v. *Sturry,* 33 S. W. (2d) 762.

was urged that because the municipal body which had fixed the telephone rates had exceeded its authority no State action was involved. This Court refused to accept that view, holding, on the contrary, that the action was State action, the rates confiscatory and that the Fourteenth Amendment applied "to every person whether natural or juridical who is the repository of State power." The emphasis, therefore, was not upon whether power was properly applied, but upon whether State power in fact existed. So here the holding of the State Court that political parties have inherent power to exclude Negroes from primary elections, and in so acting were not exercising state powers, is not binding upon this Court.

In conclusion, we submit that the Executive Committee had no inherent power to adopt the resolution which provided that only white Democrats could vote in the primary election. The only power which the committee could have had, it received from the Legislature of the State. The Legislature by the new Article 3107 intended the committee to adopt such a resolution as was adopted and the committee acted with this specific statute in mind. Under the Texas authorities, no other action by the committee would have been possible. The action of the committee, therefore, and the action of the Legislature are equally in violation of the Fourteenth Amendment.

B. Even if the Democratic State Executive Committee in adopting the resolution restricting voting at Democratic primaries to "white" Democrats exceeded the powers delegated to it by the Legislature in Chapter 67, Laws of 1927, its action, though ultra vires, constituted State action in violation of the Fourteenth Amendment because it authorized and worked a classification based on color.

Under the decisions of this Court in *Home Tel. & Tel. Co.* v. *Los Angeles,* 227 U. S. 278, and the cases consistently in accord therewith (*Raymond* v. *Chicago Traction Co.,* 207 U. S. 20; *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S.

426; cf. *Yick Wo* v. *Hopkins*, 118 U. S. 356), it has become definitely established that the limitations which the Fourteenth and Fifteenth Amendments impose upon State action apply not merely to the enactment of legislation by State Legislatures but also, among other things, to action taken pursuant to such statutes by those selected to act thereunder. We may have a statute which is itself subject to no constitutional objection, and which authorizes altogether proper action to be taken by designated persons on behalf of the State. Yet, if these persons disobey the statute and take action thereunder which, if taken by the State, would be violative of the Fourteenth or Fifteenth Amendment, their action is State action, permitting those injured thereby to seek redress therefor by suit or action in a Federal court. As this Court has said in *Home Tel. & Tel. Co.* v. *Los Angeles, supra* (pp. 286-287):

> "the provisions of the (Fourteenth) Amendment as conclusively fixed by previous decisions are generic in their terms, are addressed, of course, to the states, but also to every person whether natural or juridical who is the repository of state power. By this construction the reach of the Amendment is shown to be coextensive with any exercise by a state of power, in whatever form exerted * * * **where an officer or other representative of the state in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the state has authorized the wrong is irrelevant** and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power." (Black type ours.)

In view of the considerations advanced under Point II, subdivision A, *supra*, it is clear, we submit, that the Democratic State Executive Committee falls precisely within the foregoing decision so far as concerns its action in adopting the resolution limiting voting at the primary election of July 28, 1928, to white Democrats. If its action in adopting the resolution was not authorized by Article

3107, it necessarily was an abuse of the power to determine the qualifications of voters at primary elections which the committee possessed under that statute. It nevertheless was action to which the reach of the Fourteenth Amendment extended, and being action which denied to Negroes the equal protection of the laws, it was action which was forbidden by that Amendment and which therefore was void, because in the *Home Telephone & Telegraph* case this Court recognized that although within the boundaries of the State the action of a State agency might be *ultra vires*, it might nevertheless, in this forum, be deemed State action violative of the Fourteenth Amendment.

Nor, if it be assumed, as we have in this sub-point assumed, that the Executive Committee was not authorized under the broad language of Article 3107 to determine among other things, that only white Democrats may vote at Democratic primary elections, can the Committee claim that any such classification could rest upon its inherent power. In making this assumption as to the scope of the generic language in the present Article 3107 we are reading into it an implied limitation as to the scope of the grant which it intended to confer upon the Executive Committee. Certainly if an express limitation to this effect were included in the Article, the Executive Committee could hardly claim any inherent power to exceed it; and there is no reason why an implied limitation should not have the same effect once that implication is made.

This is conclusively covered by *Love* v. *Wilcox, supra*. In that case the Supreme Court of Texas had before it the limiting clause in the present Article 3107 which precluded the operation of the general grant in Article 3107 as to the past loyalty of those who participated in the prior primaries of the Democratic Party. Nowithstanding this provision the Democratic State Executive Committee sought to keep Love from becoming a candidate in the Democratic primary because he had voted against the party in the 1928 elections after having participated in the party primary of that year. The Committee sought to justify its action on the basis of its inherent power to

manage the affairs of the party and to determine who could present his name for nomination at a primary.

The Supreme Court of Texas flatly held that the Executive Committee had no inherent power to exceed any of the limitations which the Legislature had provided for in Article 3107. If, therefore, we read a limitation into Article 3107 so that it is not regarded as covering such a classification as made in the resolution, it follows from *Love* v. *Wilcox* that the Executive Committee could under no circumstances by virtue of any power of its own exceed the limits which the Legislature had drawn. The Committee could make no more claim to inherent power to exceed this limitation than to exceed the limitation with respect to past partly disloyalty so completely disposed of in *Love* v. *Wilcox*. It follows therefore that even if the present Article 3107 be assumed—contrary to the entire legislative history of the Article—not to have authorized the resolution, nevertheless the resolution could not be based upon any inherent power of the Executive Committee, but is referable only to the position in which the Executive Committee was put by whatever grant of power Article 3107 made to the Committee. This follows from the doctrine of *ultra vires* use embodied in the *Home Tel. & Tel. Co.* case. Under any construction therefore of Article 3107 the classification in the resolution must be deemed State action because the statute alone has made the resolution possible.

C. The Democratic State Executive Committee, acting in relation to primary elections, was part of the governmental machinery of the State. The resolution of that Committee restricting voting in Democratic primaries to "white" Democrats was State action and violated the Fourteenth Amendment and afforded respondents no justification in denying to petitioner the right to vote.

In the preceding points we have shown that although the primary machinery was originally the private affair

of the party, it has become absorbed by the State, which has exercised its sovereignty over primary elections with the "rules and regulations laid down in minute and cumbersome detail" (*Briscoe* v. *Boyle,* quoted *supra,* at pages 23-24).

Political parties now, in Texas at least, have become State agencies in their relations to elections and primaries.

In *"Primary Elections"* by Merriam & Overacker (1928 Edition), the authors state at page 140:

> "The theory of the party as a voluntary association has been completely overthrown by the contrary doctrine that the party is in reality a governmental agency subject to legal regulations and control."

And see the able article by Meyer M. Brown in 23 Michigan Law Review, 279.

Bliley v. *West,* 42 F. (2d) 101, arose out of a similar effort by the State of Virginia to disenfranchise Negroes in the primary elections. There the statute described voters as "all persons qualified to vote at the election for which the primary is held, and not disqualified by reason of other requirements in the law of the party to which he belongs". The Democratic State Convention of 1924 in Virginia adopted a resolution declaring that only white persons should participate in the Democratic primary. The action was brought for damages against the judges of election who set up that resolution as a justification. Defendants demurred and the District Court overruled the demurrer in an opinion written by Judge Groner (33 F. [2d] 177). The case went to trial. Upon appeal from the final judgment in favor of the plaintiff the Circuit Court of Appeals for the Fourth Circuit affirmed the judgment, adopting the opinion of Judge Groner as its own.

Judge Groner cited the case of *Commonwealth* v. *Willcox,* 111 Va. 849, at page 859, in which the Court held that a primary once adopted by a political party becomes and constitutes a necessary part of the election machinery and "fulfils an essential function in the plea to promote honesty in the conduct of elections—elections which shall

faithfully reflect and register the unbought will of the electors."

The primary machinery is therefore no longer the peculiar province of the political party and the test of the superior sovereignty of the State over that of the party in relation to the function of the party in the primary machinery is to be found in such cases as *Love* v. *Wilcox, supra,* where the Supreme Court of Texas held that Chapter 67 of the Laws of 1927 prohibited the party executive committee from excluding a candidate from the party primaries because of past disloyalty to the party and could not be overridden by any action of the party executive committee, *Briscoe* v. *Boyle, supra,* which decided that under the old Article 3107 the party could not add to the qualifications fixed by the Legislature in determining qualifications for party members, and *Clancy* v. *Clough* (Tex.), 30 S. W. (2d) 569, where it was held that the executive committee of the City of Houston was without power to regulate the requisites for candidates for membership on the executive committee itself on the ground that Articles 3110 and 3111 of the Revised Civil Statutes completely covered the field of qualifications.

In other words, those cases hold that the party committees are so much controlled by State authority that they are without power to vary on their own initiative the qualifications prescribed for voters, candidates or committee members.

It must be clear, then, that whether or not the Legislature intended by Chapter 67 of the Laws of 1927 to vest in the State Executive Committee the power to exclude Negroes from Democratic primaries, the Legislature adopted the executive committee as its agency in the administration of the primary laws.*

* The very existence of such bodies as the County and State Executive Committees depends upon the statutes. Articles 3100, 3118 and 3139 (Tex. Rev. Civ. Stats. 1925) deal with who shall choose these bodies and how that shall be done. And these bodies are created by the statute to perform the manifold duties which are minutely prescribed in nearly each one of the approximately 70 sections which comprise the primary law (Chap. 13, *ibid.*) of the State of Texas. Thus this Committee and their powers and duties are created as parts of the entire primary machinery.

It follows as an elementary proposition that the State cannot perform by an agency an act which it could not accomplish in its own name, that it cannot give force of law to a prohibited enactment, from whatever source originating.

Williams v. *Bruffy*, 96 U. S. 176.
Ford v. *Surget*, 97 U. S. 594.
King Mfg. Co. v. *Augusta*, 277 U. S. 100, 107-114.
Home Tel. & Tel. Co. v. *Los Angeles*, 227 U. S. 278.

In *Standard Scale Co.* v. *Farrell*, 249 U. S. 571, at page 577, Mr. Justice Brandeis said:

> "* * * For the protection of the Federal Constitution applies, whatever the form in which the legislative power of the State is exerted; that is, whether it be by a constitution, an act of the legislature, or an act of any subordinate instrumentality of the State exercising delegated legislative authority, like an ordinance of a municipality or an order of a commission."

The resolution which was adopted by the Democratic State Executive Committee restricting the primaries to white Democrats is therefore within the same prohibition of the Fourteenth Amendment as would have been a direct legislative enactment to this effect.

Nor does such a case as *Waples* v. *Marrast*, 108 Tex. 5, 184 S. W. 180, holding that a political party is not an agency of the government of Texas and hence it was unconstitutional for the Legislature to attempt to provide for the expense of a primary election out of the State treasury, detract from the conclusion just stated. Political parties and primary elections may be deemed cogs in the State election machinery for some purposes and not for other purposes.*

* Compare *Briscoe* v. *Boyle*, *supra*, and *State ex rel. Moore* v. *Meharg* (Tex. Civ. App., 1926), 287 S. W. 670, with the *Waples* and *White* cases, *supra*.

Moreover, it was recognized in the *Home Telephone & Telegraph* case that the local conception of State action may differ from the national conception of State action.

D. Respondents by reason of their office as judges of election derived their power to deny the petitioner the right to vote at the primary election from the statutes of the State. In applying that power to a State purpose in such a way as to work a color classification they violated the Fourteenth Amendment irrespective of Chapter 67 of the Laws of 1927 and the resolution of the Democratic State Executive Committee.

The opinion of the District Court states that (R. 25):

> "The Court also holds that the members of a voluntary association, such as a political organization, members of the Democratic party in Texas, possess inherent power to prescribe qualifications regulating membership of such organization, or political party. That this is, and was, true without reference to the passage by the Legislature of the State of Texas of said Art. 3107, and is not affected by the passage of said act, and such inherent power remains and exists just as if said act had never been passed."

That this holding is diametrically opposed to the decisions of the Texas courts in *Briscoe* v. *Boyle, supra,* and in *Love* v. *Wilcox, supra,* has already been demonstrated (see pp. 23-26, *supra*). But assuming, for the sake of argument, that the holding were correct, and assuming even that the action of the State Executive Committee was not State action within the meaning and application of the Fourteenth Amendment, it still would not follow that the action of the *defendants* complained of in the case at bar also was not State action in violation of that

Amendment. This litigation is not brought against the members of the Executive Committee because of their action in adopting the resolution barring Negroes from the primary election of July 28, 1928. It is brought against the judges of election, who—whether they be deemed State officials, party officials or the representatives of the contending candidates who contribute to their remuneration—are clothed with the power to act in the capacity of judges of election at primary elections by the State itself. **Though their designation may come from the party, their powers flow from the State alone and their function as judges of election is to accomplish a State purpose.**

The Texas Legislature has with meticulous care provided for the time, place and manner of holding primary elections and of determining and contesting the results.

Primary elections are themselves compulsory, under the Texas statutes, for all parties which cast more than 100,000 votes at the last general election (1925 Tex. Rev. Civ. Stats., Elections, Art. 3101). Actually, this provision always has applied and now does apply only to the Democratic Party, because it alone has been able to muster the requisite number of votes. The time, place and manner of holding primary elections, as well as of determining and contesting the results thereof, are comprehensively and minutely prescribed by statutory provisions (1925 Tex. Rev. Civ. Stats., Elections, Arts. 3102-3105, 3108, 3109-3114, 3116-3117, 3120, 3122-3127, 3146-3153).

Authority Vested in Judges of Election.

Among these provisions are the ones which provide for the appointment of judges of election (Art. 3104) and prescribe their functions, powers and duties (Arts. 3105, 3006-3007). These include, among others, the following (Art. 3105):

> "Judges of primary elections have the authority, and it shall be their duty, to administer oaths to

preserve order at the election, to appoint special officers to enforce the observance of order and to make arrests, as judges of general elections are authorized and required to do. Such judges and officers shall compel the observance of the law that prohibits loitering or electioneering within one hundred feet of the entrance of the polling place, and shall arrest, or cause to be arrested, anyone engaged in the work of conveying voters to the polls in carriages or other mode of conveyance, except as permitted by this title."

The power "to administer oaths * * * as judges of general elections are authorized and required to do" embraces, above all others, a power to administer such oaths for the purposes of ascertaining the qualifications of a challenged voter. It is for this purpose, indeed, that the power to administer oaths is conferred upon judges of election. Article 3006 provides:

"When a person offering to vote shall be objected to by an election judge or a supervisor or challenger, the presiding judge shall examine him upon an oath touching the points of such objection, and, if such person fails to establish his right to vote to the satisfaction of the majority of the judges, he shall not vote."

The powers of judges of primary elections to preserve order, appoint special officers, enforce the observance of order and make arrests "as judges of general elections are authorized and required to do," as provided in Article 3105, refer to Article 3002, which for these purposes gives the presiding judge of elections "the power of the district judge to enforce order and keep the peace." *This is clearly a State judicial power.*

Article 2954 specifies the persons who are not allowed to vote. These include infants, idiots, lunatics, paupers,

and the like. They do *not* include Negroes, as such. Article 2955 then specifies the persons who *are* allowed to vote.*

In Title Six, Chapter Four, of the Texas Penal Code of 1925, relating to "Offenses Affecting the Right of Suffrage," † it is provided in Article 217 as follows:

> **"Refusing to permit voter to vote.** Any judge of any election who shall refuse to receive the vote of any qualified elector who, when his vote is objected to, shows by his own oath that he is entitled to vote, or who shall refuse to deliver an official ballot to one entitled to vote under the law, or who shall wilfully refuse to receive a ballot after one entitled to vote has legally folded and returned same, shall be fined not to exceed five hundred dollars."

Article 231 makes Article 217 specifically applicable to primary elections.

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* "Qualifications for voting.—Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one years and who shall be a citizen of the United States, and who shall have resided in this State one year next preceding an election, and the last six months within the district or county in which he or she offers to vote, shall be deemed a qualified elector. The electors living in an unorganized county may vote at an election precinct in the county to which such county is attached for judicial purposes; provided that any voter who is subject to pay a poll tax under the laws of this State or ordinances of any city or town in this State, shall have paid said tax before offering to vote at any election in this State and holds a receipt showing that said poll tax was paid before the first day of February next preceding such election; and, if said voter is exempt from paying a poll tax and resides in a city of ten thousand inhabitants or more, he or she must procure a certificate showing his or her exemptions, as required by this title. If such voter shall have lost or misplaced said tax receipt, he or she shall be entitled to vote upon making and leaving with the judge of the election an affidavit that such tax was paid by him or her, or by his wife or by her husband before said first day of February next preceding such election at which he or she offers to vote, and that said receipt has been lost or misplaced. In any election held only in a subdivision of a county for the purpose of determining any local question or proposition affecting only such subdivision of the county, then in addition to the foregoing qualifications, the voter must have resided in said county for six months next preceding such election. The provisions of this article as to casting ballots shall apply to all elections including general, special and *primary* elections." (Italics ours.)

† Article 218 provides for a fine against a judge of election who tries to influence a voter "where an election, either primary, special or general, is being held," and other penal provisions apply to improperly opening the ballot (Art. 221), divulging a vote (Art. 222), interfering with the ballot (Art. 226), making a false canvass (Art. 227), false certification by the chairman (Art. 228), giving false certificate of election (Art. 229), wilfully failing or refusing to discharge his duty (Art. 230).

Thus it appears that even if these respondents be not State officers in the same category and to the same extent as the Governor or the Attorney General of the State, they are nevertheless quasi public officials, receiving the definition of their duties and the badge of their authority from the statutes of the State, and the Legislature has by its own edicts given to judges of primary elections the powers and duties of judges of general elections and subjected them to the same penalties applicable to judges of general elections.

It requires no extended argument to demonstrate that the conduct of primary elections is, when authorized by statute, a State function, pointed to achieving a fair expression of popular, sovereign will, and that the judges of election acting in their capacities as judges of primary elections are fulfilling a State purpose.

Consequences of Abuse of Powers.

It seems apparent, from the foregoing resumé of the Texas Election Laws, that the defendants, as judges of election were charged by the State of Texas with the function and duty of determining the plaintiff's qualifications, under the Texas laws, to vote at the primary election in question in the case at bar. It is equally apparent that in passing on those qualifications and in determining that the plaintiff did not meet them because he was a Negro, the defendants were improperly administering the powers and duties specifically conferred upon them, and upon them alone, by the State of Texas, for the purpose of enforcing, on behalf of that State, the laws which it had enacted with respect to the conduct of primary elections.

We submit, therefore, that the contention of the defendants that the wrong which they did the plaintiff in depriving him of his right to vote at the primary election over which they officiated, was not a wrong forbidden by the Fourteenth or Fifteenth Amendments, because those Amendments apply only to State and not to individual action, is wholly without merit. We have here the plainest

possible instance of a case "where," in the language of *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278, 287, "an officer or other representative of a state in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment," and, hence, where the misuse of this power itself supplies the requisite element of State action in the case at bar and eliminates the only possibility of differentiating it from *Nixon* v. *Herndon*.

It should be noted that the emphasis in the *Home Tel. & Tel. Co.* case is placed, not upon the official title of the actor, but upon the vesting in him of State power, viz., power granted by the State devoted to a State purpose. This is made clear from further quotations from the opinion of Mr. Chief Justice White at pages 287 *et seq.*, where he says, speaking of the Fourteenth Amendment:

> "It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids even although the consummation of the wrong may not be within the powers possessed if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power."

It was then pointed out that the Amendment, in looking to the enforcement of rights which it guaranteed and to the prevention of wrongs which it prohibited, did not proceed only upon the assumption that States acting in their governmental capacities "in a complete sense" may violate the provisions of the Amendment, but "which was more normally to be contemplated, that State powers might be

abused by those who possessed them and as a result might be used as the instrument for doing wrongs" and that the Amendment provided against this contingency. And again, at page 288, he said:

> "Under these circumstances it may not be doubted that where a state officer under an assertion of power from the State is doing an act which could only be done upon the predicate that there was such power, the inquiry as to the repugnancy of the act to the Fourteenth Amendment cannot be avoided by insisting that there is a want of power. * * * To repeat, for the purpose of enforcing the rights guaranteed by the Amendment when it is alleged that a state officer in virtue of state power is doing an act which if permitted to be done *prima facie* would violate the Amendment, *the subject must be tested by assuming that the officer possessed power if the act be one which there would not be opportunity to perform but for the possession of some state authority.*" (Italics ours.)

Applying that test to this case, it is clear that the respondents would not have had the opportunity to refuse to permit the petitioner to vote in the Democratic Party primary election if they had not become possessed of the power to act as judges of election through act of the Legislature of the State.

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, it was held that an ordinance violates the Fourteenth Amendment if it confers upon municipal authorities arbitrary power at their own will and without regard to discretion in the legal sense of the term to give or withhold consent as to persons or places for the carrying on of a business, and that an administration of such an ordinance violates the provisions of the Fourteenth Amendment if it makes arbitrary and unjust discriminations founded on differences of race between persons otherwise in similar circumstances. This Court pointed to "the political franchise of voting" as one of the illustrations of the principle that a man should not be compelled to hold his life or means of

living or any material right essential to the enjoyment of life at the mere will of another. The Court said, at page 370:

> "Though not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights."

Mr. Justice Matthews said, at page 373:

> "In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, **whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of the equal protection of the laws which is secured to the petitioners, as to all persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States.** Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Chy Lung* v. *Freeman*, 92 U. S. 275; *Ex parte Virginia*, 100 U. S. 339; *Neal* v. *Delaware*, 103 U. S. 370; and *Soon Hing* v. *Crowley*, 113 U. S. 703." (Black type ours.)

Expenses of Primary Election.

It is suggested in the opinion of the District Court (R. 24), and again in the opinion of the Circuit Court of Appeals (R. 30), that in view of the fact that the respondents were paid for the services which they rendered as judges of election out of a fund derived from contributions by the participating candidates, they could not be acting as officers of the State of Texas. The source of remuneration is never determinative as to the status or official capacity of a person. There is no end of cases sustaining this proposition.* See:

Tumey v. *Ohio*, 273 U. S. 510;
Kimbrough v. *Barnett*, 93 Tex. 301, 55 S. W. 120;
Hendricks v. *The State*, 20 Tex. Civ. App. 178, 49 S. W. 705;
Willis v. *Owen*, 43 Tex. 41;
Lincoln v. *Hapgood*, 11 Mass. 350.

Nor is it material that the County Executive Committee of the party appoints the judges of primary elections. These appointments are made solely by reason of express statutory authority (Art. 3104, Tex. Rev. Cov. Stats., 1925), and membership on the County Executive Committee is itself subject to the sovereign will of the State as expressed in Article 3107. To this effect is *Glancy* v. *Clough*, *supra*.

If, therefore, these judges of election have abused their powers derived from the State and have used them "as the instrument of doing wrong," their actions are State actions. The classification by reason of color is forbidden to the State by the Fourteenth and Fifteenth Amendments and this prohibition is controlling not only in so far as the legislative action is concerned, but also applies to anyone acting under authority lodged in him by the State.

*Cases are collected in exhaustive note in 53 A. L. R. 595. See also 72 U. of Pa. Law Rev., p. 222, Note 9; 15 Cornell Law Quar. 267.

To reduce the Democratic primary election to the status of a purely private election akin to the election of the officers of the Klu Klux Klan, or of any other private lodge, league or "voluntary association," it would be necessary to view the situation not merely without reference to Article 3107 but also without reference to all of the other statutory provisions which have just been considered. This it is improper to do unless the Texas Legislature was without power to enact these provisions. Such a contention has not been made, and need not be considered, the existence of the requisite legislative power being too clear for argument.

It also hardly requires argument to establish that the defendants' statutory duties as officers or representatives of the State of Texas could not possibly be justified or affected by the purely private action of a political party any more than by the action of any private lodge or voluntary association which might presume to interfere with the conduct of primary elections in Texas. Powers and duties provided for by statute can be abrogated or changed only by or pursuant to statute, and private resolutions by private parties cannot justify abuses of such powers committed by those who are entrusted with their execution, as were these respondents.

In conclusion, we submit that on every reasonable alternative, we necessarily have the situation of a deprivation of the plaintiff's right not to be discriminated against at the polls by reason of his color; we have a lack of justification; and we have the fact that this unjustified deprivation was made possible only by the patent of authority with which the State has invested these respondents. We have, therefore, precisely the situation which, in *Nixon* v. *Herndon*, was held to support both a cause of action for damages and the existence of Federal jurisdiction.

III.

The right of petitioner to vote in the primary regardless of race or color was denied and abridged by the State of Texas, in violation of the Fifteenth Amendment.

In *Nixon* v. *Herndon, supra,* it was deemed unnecessary to consider the Fifteenth Amendment, because it seemed to this Court hard to imagine a more direct and obvious infringement of the Fourteenth, and while we believe that the Fourteenth Amendment is fully applicable to the present case, the Fifteenth Amendment likewise protects the petitioner.

It was determined in *Nixon* v. *Herndon* that the same reasons which allowed a recovery for denying the plaintiff a vote at a final election allowed it for denying a vote at a primary election that may determine the final result. It follows that if the denial of petitioner's right to vote violated the Fifteenth Amendment, he has an equally valid cause of action.

The petitioner's right to vote in this case was denied or abridged, if at all, "on account of race or color" (R. 3), and the denial or abridgment of this right was the direct result of action by the State of Texas. The same arguments with respect to State action contained in Point II *supra,* and addressed to the Fourteenth Amendment, are equally applicable to the Fifteenth.

A Primary Vote Is a Vote.

The question now to be considered is whether the petitioner's right to vote was denied or abridged by reason of the refusal of the respondents to permit him to *vote* at a *primary* election. In other words, is a vote at a primary election a vote within the intendment of the Fifteenth Amendment?

The Secretary of State proclaimed the Fifteenth Amendment to have been duly ratified on March 30, 1870. Section

31 of Title 8 of the United States Code (*supra*, p. 10) was adopted by Act of May 31, 1870 (Chap. 114, Sec. 1; 17 Stat. 40), and evidences a contemporaneous interpretation of the Fifteenth Amendment which applies the right to vote to "*any* election" by the people in a State or any subdivision.

The right to vote was certainly not then intended to be narrowly construed, because, as Mr. Justice Hunt said in *United States* v. *Reese*, 92 U. S. 214, "It was believed that the newly enfranchised people could be most effectually secured in the protection of their rights of life, liberty and pursuit of happiness, by giving them the greatest of rights among free men—the ballot. Hence the Fifteenth Amendment was passed by Congress and adopted by the States."

At this point it is well to indicate that the real issue is not whether a primary election is an election, but whether a vote at such an election is a vote contemplated by the Fifteenth Amendment. This distinction is of importance in a consideration of some of the cases on this subject.

"Vote" is defined in *Bouvier's Law Dictionary* as "suffrage; the voice of an individual in making a choice by many."

In *Funk & Wagnall's Standard Dictionary* it is defined as "1. A formal expression of will or opinion in regard to some question submitted for decision, as in electing officers, sanctioning laws, passing resolutions, etc.: commonly signified by the voice or by ballot, by a show of hands, or by rising to one's feet. * * *"

The word "vote" is used throughout the Texas Election Laws in its usual sense, and there is no distinction to be found in the use of the word in connection with primary or general elections. Article 3107 itself makes use of the expression, and unless the contrary is clearly shown, it must be deemed that the Legislature intended there to use "vote" in the same manner as it did in other parts of the statute.

In the light of Article 236 of the *Texas Penal Code* of 1925, it is difficult to see how any different definition can

be given to voting at a primary and voting at a general election. That article reads:

> "**Illegal voting at primary.**—Any person voting at any primary election called and held by authority of any political party for the purpose of nominating candidates of such political party for any public office who is not entitled to vote in the election precinct where he offers to vote at the next State, county or municipal election, or who shall vote more than once at the same or different precinct or polls on the same day, or different days in the same primary election, shall be fined not exceeding five hundred dollars, or be imprisoned in jail not exceeding sixty days, or both." *

Article 241 of the *Penal Code* provides that "whoever at a general, special or primary election votes or attempts to vote more than once shall be fined * * *." Again, Article 216 of the *Penal Code:* "Any judge of an election or primary who wilfully permits a person to vote, whose name does not appear on the list of certified voters of the precinct * * *" is subject to fine. And Article 3121 of the *Texas Revised Civil Statutes* of 1925 provides that the county tax collector shall deliver to the chairman of the county executive committee of each political party, for its use in primary elections, certified lists of qualified voters before the polls are open. That article further provides:

> "No primary election shall be legal, unless such list is obtained and used for reference during the election. **Opposite the name of every voter on said list shall be stamped, when his vote is cast, with a rubber or wooden stamp, or written with pen and ink, the words, 'primary—voted,' with the date of such primary under the same."** (Black type ours.)

The whole tenor of the primary laws of Texas is to protect the expression of the sovereign will of the people in nominating candidates, just as do the laws dealing with general elections (*Love* v. *Wilcox, supra*). The reason that this must be so is obvious. The primary election

* Compare Article 232, entitled "Illegal voting."

involves the initial and as we shall see, in Texas, the determinative choice of the officers of the government. Would it not be absurd, then, to regard the primary election as that of a private association, such as an election of a lodge or other social or business organization?

The Democratic primary is not essentially concerned with the choice of officers of the Democratic Party. Its concern is with the staff of government. It does not involve the issues of a private association, but the expression of the voice of the people in an affair of state.

While it is true that all of the voters at the final election are not eligible to vote at a primary election, this is not because of lack of power on the part of the voter. The only obstacles, other than race and color, are the pledge which Article 3110 requires him to make in good conscience that he will support the nominee of the primary at which he votes,* and Article 240 of the *Penal Code*, which forbids voting in the primary of more than one party.

This definition or classification of voters on the basis of their principles and the dictates of their consciences is quite another thing from a restraint upon voting based upon race or color. It is a provision, in the words of Mr. Justice Holmes in *Commonwealth* v. *Rogers*, 63 N. E. 421 (Mass.), adopted as a "precaution against the fraudulent intrusion of members of a different party for sinister purposes." In other words, the election laws grant the right of the citizen to express his sovereign will by his vote within broad classifications and aim to secure and protect that right.

Fifteenth Amendment Like Nineteenth.

If it were true that the right to vote guaranteed by the Fifteenth Amendment did not extend to primary elections, then the same would be true of the Nineteenth Amendment, which in identical words guarantees the right to vote without regard to sex. Surely no court would

* *Westerman* v. *Mimms*, 220 S. W. 178 (Texas); *Briscoe* v. *Boyle*, *supra*.

hold that a woman could be denied the right to vote at a primary merely because she was a woman. There is no distinction to be drawn between the two Amendments. The Fifteenth has been frequently held to be self-executing (*Neal* v. *Delaware*, 103 U. S. 370, 389; *Ex parte Yarbrough*, 110 U. S. 651, 665). And even were it not self-executing, Section 31, Title 8 of the *United States Code* expresses in statutory form what the Amendment contemplated, to wit, to eliminate forever from the classification of voters any limitation based on race or color, such as deprived this petitioner of his vote.

Historical Error.

Nor is the suggestion of the District Court (R. 20), that primary elections were unknown at the time of the adoption of the Fifteenth Amendment sound, nor does it serve to distinguish that Amendment from the Nineteenth Amendment. The Fifteenth Amendment was adopted in 1870. On March 26, 1866, California passed an Act (Chap. 359) regulating primaries, and on April 24, 1866, New York passed an Act (Chap. 783) also dealing with primaries.* And in 1868 the Union League Club of Philadelphia offered a prize to anyone who would suggest the best plan by which to overcome the evils of the primary system.†

Shortly on the heels of the passage of the Amendment came primary legislation in other States. In 1871 Ohio and Pennsylvania followed the example set by New York and California. In 1873 Nevada followed suit and in 1875 Missouri passed regulatory measures (Merriam & Overacker, *supra*, p. 12). These statutes were so widespread throughout the country as to reveal a general knowledge of the primary as a method of nomination at the time of the adoption of the Fifteenth Amendment.

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*See Merriam & Overacker, *supra*, pp. 8-12; Sargent on Law of Primary Elections, 2 Minn. Law Rev. 97.

†Union League Club of Philadelphia, "Essays on Politics," 1868.

The Newberry and Other Cases Distinguished.

The respondents and the District Court (R. 26) placed reliance on the decision of this Court in *Newberry* v. *United States*, 256 U. S. 232, which involved the constitutionality of Section 8 of the *Federal Corrupt Practices Act*, which undertook to limit the amount of money which a candidate for Representative in Congress or for United States Senator might contribute or cause to be contributed in procuring his nomination or election. In so far as it applied to a primary election of candidates for a seat in the Senate, the Fifteenth Amendment was in no way involved.

The meaning of the phrase "the right to vote" was not and could not have been considered, since there had been no denial or abridgment of that right on account of race, color, previous condition of servitude, or of sex. The sole constitutional question involved concerned the interpretation to be given to Article I, Section 4, of the Constitution, which provides:

> "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

The question, therefore, was whether the limited right to deal with "the times, places and manner of holding elections" involved the right to regulate the use of money in connection with the primary election of candidates for the Senate and House of Representatives.

It was held that an undefined power in Congress over elections of Senators and Representatives not derived from Article I, Section 4, could not be inferred from the fact that the offices were created by the Constitution or by assuming that the Government must be free from any control by the States over matters affecting the choice of its officers. It was further held that the elections within

the original intendment of Section 4 of Article I were those wherein Senators should be chosen by Legislatures and Representatives by voters "possessing the qualifications requisite for electors of the most numerous branch of the state legislature."

It was likewise held that the Seventeenth Amendment did not modify Article I, Section 4, which was the source of congressional power to regulate the times, places and manner of holding elections; and, finally, that the power to control party primaries for designating candidates for the Senate was not "within the grant of power to regulate the manner of holding elections."

The "right to vote" is infinitely more comprehensive in its meaning, scope and operation than is the reference to the "manner of holding elections for senators and representatives," which was under consideration in *Newberry v. United States.*

Moreover, in that case Justices McReynolds, Holmes, Day and Vandevanter voted for reversal on the constitutional ground, while Mr. Chief Justice White, differing on the constitutional question, voted for a reversal and a new trial because of an error in the charge to the jury, and Justices Pitney, Brandeis and Clarke, likewise finding error in the instructions to the jury, were of the opinion that the Act itself was valid. Mr. Justice McKenna concurred in the opinion of Mr. Justice McReynolds "as applied to the statute under consideration, which was enacted prior to the Seventeenth Amendment, but reserved the question of the power of Congress under that Amendment."

It is clear from a reading of the opinions in the *Newberry* case that the principal issue was that of the sovereignty of the States as against the sovereignty of the Federal Government. The question was treated from the point of view of these contending sovereignties in their relation to the candidates. *No consideration was given to the right of the citizen to vote,* and consequently, the decision is no more relevant here on the question of the

right to vote under the Fifteenth Amendment than it was in *Nixon* v. *Herndon* on the right to bring a cause of action for the denial of a vote by means of unconstitutional classification.

To say, as did this Court in the *Newberry* case (p. 250), that primaries are "in no sense elections for an office but merely methods by which the party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified voters," does not dispose of the basic questions here, which are (1) whether a color classification shall enter into a definition of "party adherents" and (2) whether the method of agreement upon candidates to be offered and supported is a vote within the meaning of the Fifteenth Amendment.

Koy v. *Schneider,* 110 Tex. 369, likewise has no bearing on this case. There the word "elections" in the Constitution of the State of Texas was held not to include primaries. The case involved the Women's Suffrage Act of Texas enacted before the Nineteenth Amendment and which purported to give women the right to vote in a primary. The Constitution restricted suffrage in "elections" to men, and the Court, in order to permit women to vote in primaries under the statute, adopted a construction of the word "elections" contained in the Constitution which limited its application to general elections. Here, again, the question at issue was not a definition of the right to vote but of the meaning of an election, and the Court must have been influenced by the relative importance of primary elections over general elections.

On the other hand, in *Ashford* v. *Goodwin,* 103 Tex. 491, and *Anderson* v. *Ash,* 62 Tex. Civ. App. 262, it was held that the words "contested elections" applied to primaries as well as general elections and that consequently the District Courts had jurisdiction under the Constitution to consider a contest arising out of a primary election.

Petitioner's Right to Vote Abridged Even If Not Denied.

Even if it could be said that the refusal to permit the petitioner to vote at the primary election was not a denial of his right to vote, because he could still express his will at the general election, nevertheless his right to vote would have been abridged.

In States such as Texas, where the primary election is in a realistic sense the only true election, the vote at the final election is merely a formal flourish. The courts of Texas have taken judicial notice of the fact that for all practical purposes, and certainly in so far as State elections are concerned, there is only one political party, and that the real political battles of the State are not those held at the final election, but those waged for nomination at the Democratic primaries.*

So in *Ex rel. Moore* v. *Meharg* (Tex. Civ. App. 1926), 287 S. W. 670, the Court said:

> "Indeed it is a matter of common knowledge in this State that a Democratic primary election held in accordance with our statutes is virtually decisive of the question as to who shall be elected at the general election. **In other words, barring certain exceptions, a primary election is equivalent to a general election.**" (Black type ours.)

In an article by Meyer M. Brown in 23 *Michigan Law Review*, 279, the author says:

> "In Texas a victory in a primary on the Democratic side means practically certain election."

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* In 1930, Sterling, Democrat, defeated Talbot, Republican, by a plurality of 124,000 for Governor. In 1926, Moody, Democrat, defeated Haines, Republican, by 233,068 to 31,531. In 1924, Mrs. Ferguson, Democrat, beat Butte, Republican, 422,059 to 298,046 for Governor. In 1928, when the State of Texas went Republican for President, Connally, Democrat, defeated Kennerly, Republican, 566,139 to 129,910 for United States Senator (*World Almanac*, 1931, p. 904).

And in *Newberry* v. *United States, supra,* Mr. Justice White said, at pages 266-267:

> "The large number of States which at this day have by law established senatorial primaries shows the development of the movement which originated so long ago under the circumstances just stated. They serve to indicate the tenacity of the conviction that the relation of the primary to the election is so intimate that the influence of the former is largely determinative of the latter. I have appended in the margin a statement from a publication on the subject, showing how well founded this conviction is and how it has come to pass **that in some cases at least the result of the primary has been in substance to render the subsequent election merely perfunctory.**" (Black type ours.)

The publication referred to by Mr. Justice White as in the margin is *Merriam on Primary Elections* (1908 Ed., pp. 83-85), where it is said:

> "In many western and southern states the direct primary method has been applied to the choice of United States senators as well as to state officers. In the southern states, victory in such a primary, on the Democratic side, is practically the equivalent of an election, as there is but one effective party in that section of the country."

And so, too, in *Koy* v. *Schneider, supra,* Chief Justice Phillips said:

> "No court can blind its eyes to this universally known fact. * * * Of what use is it to enforce the Constitution only in general elections, when, in fact, the primary elections are the decisive elections in this State in the choosing of public officers."

Consequently only by the most tortuous sophistry can it be said that in denying the Negro the right to vote in the Democratic primaries of Texas and relegating him to the general election, his right to vote is neither denied nor abridged.

The rationale of the very attempt of Legislatures to control primaries must be that the citizen's right to vote in the final election would be abridged if a manipulation of primaries could in effect nullify the free expression of the voter's will at the general election.

Nor is it a valid answer to say that though the Negro is denied the right to vote in a Democratic primary he could still vote at a Republican primary. In the first place, under Chapter 67 of the Laws of 1927, the Republican State Executive Committee could adopt a resolution similar to that which was passed by the Democratic Committee. Secondly, to deprive him of his right to select between existing parties, even if not in violation of the Fifteenth Amendment, would be clearly a violation of the Fourteenth Amendment as an invalid classification which permits the white voter to take full advantage of the choice given under Article 3110 and deprives a colored man of a similar right to determine with what party in good conscience he should ally himself. Thirdly, as we have seen, it is idle to refer a man to the Republican Party in the State of Texas when the Democratic Party is the "one effective party in that section of the country" and the general election is "merely perfunctory."

IV.

Conclusion.

From what has been said it is clear that the State has, either by overt act of its Legislature or through the agency of the Democratic State Executive Committee or the judges of election, made a classification, based upon race and color, which has denied the petitioner the right to vote in a primary election. This was only made possible by the action of the State—either its direct action or its withdrawal of restraint or its grant of power to persons who could not have acted but for the grant of power.

This classification has not only worked a denial of the equal protection of the laws solely by reason of the petitioner's race and color, but it has in a very real sense deprived him of his vote, of an effective voice in the election of State officers, Congressman and Senator.

The result is unquestionably the disenfranchisement of the Negroes of Texas, and if the device here used is sustained by this Court there can be no question but that it will be followed by similar legislation in other States (see *Bliley* v. *West, supra; Holman* v. *Robinson, supra*). It will mean the disenfranchisement of millions of people, and history has shown that the disenfranchised, even more than the disinherited, are fruitful soil for communist propaganda on the one hand and enslavement on the other.

A narrow construction of the Fourteenth and Fifteenth Amendments in this case can only result in grave injury to the institutions which we have built up and to the whole structure of civil liberty which grew out of the Civil War days.

It is respectfully submitted that the judgment appealed from should be reversed, and the cause remanded for trial upon the merits.

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